

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR EXTENSION OF TIME ON BENEFICIAL )  
WATER USE PERMIT NO. 2482-s41S ) **FILED** FINAL ORDER  
GRANTED TO WAYNE HANNAH )

APR 1990

\* \* \* \* \*

The time period for filing exceptions to the Proposal for Decision in this matter has expired. A timely exception was received from the Applicant, taking exception to the Hearing Examiner's ruling that the 1987 modification of 85-2-312, MCA, does not alter or heighten the permittee's burden of proof, but simply adds additional procedural steps to the processing of an application for extension of time. (See Proposal for Decision, Preliminary Matters, pp. 3-4.) After full consideration of the Applicant's exception, the Department determines that the Department's position has been adequately set forth in the Proposal for Decision, and that no further response to the Applicant's exception is necessary.

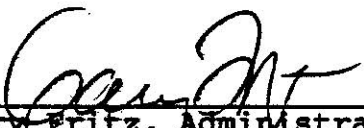
THEREFORE, the Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the October 4, 1988 Proposal for Decision, and incorporates them herein by reference. Based upon these Findings of Fact and Conclusions of Law, and all files and records herein, the Department makes the following:

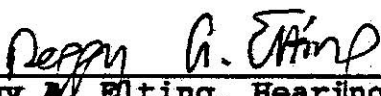
CASE # 2482

ORDER

Extension of Time to Perfect Beneficial Water Use Permit No. 2482-s41S is granted to Wayne Hannah. The Permittee shall complete the appropriation works and put water to beneficial use as specified in the Permit, and file his Notice of Completion of Water Development, on or before November 30, 1991.

Dated this 4 day of November, 1988.

  
Gary Fritz, Administrator  
Water Resources Division  
Department of Natural  
Resources and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
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(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 7<sup>th</sup> day of November, 1988, as follows:


Wayne Hannah  
RR #1  
Moore, Montana 59464

Sam Rodriguez  
Lewistown Field Manager  
P.O. Box 438  
Lewistown, Montana 59457

Rick O'Brien  
O'Brien, Inc.  
P.O. Box 101  
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Sarah Arnott  
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Daniel Van Vost  
Soil Conservation Field Office  
613 NE Main  
Lewistown, Montana 59457

  
Irene V. LaBare  
Legal Secretary

135.  
file

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION       )  
FOR EXTENSION OF TIME ON BENEFICIAL    )    PROPOSAL FOR DECISION  
WATER USE PERMIT NO. 2482-s41S        )  
GRANTED TO WAYNE HANNAH                )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing in the above-entitled matter was held on June 27, 1988 in Lewistown, Montana.

Wayne Hannah, the Permittee in this matter, appeared personally at the hearing, and by and through counsel Sarah Arnott.

Judith Hannah appeared as a witness for her husband, the Permittee.

Daniel VanVost, an employee of the Soil Conservation Service (Lewistown, Montana office), appeared at the hearing as a witness for the Permittee.

Objector O'Brien, Incorporated, was represented at the hearing by Rick O'Brien.

EXHIBITS

The Permittee offered four exhibits in support of his Application for Extension of Time in this matter:

Permittee's Exhibit A is a photocopy of the Permittee's 1985 federal income tax return, with computation sheets and schedules (14 pages).

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Permittee's Exhibit B is a photocopy of the Permittee's 1986 federal income tax return, with computation sheets and schedules (14 pages).

Permittee's Exhibit C is a photocopy of the Permittee's 1987 federal income tax return, with computation sheets and schedules (21 pages).

Permittee's Exhibit D consists of photocopies of plans prepared by the Soil Conservation Service for the Permittee's project (four single-page graphs showing cross-section elevations, one double-page graph of a cross section of the proposed dam; one double-page graph of surface elevations; two pages of "earthwork computations"; one page of cost estimates (as of 1977); and one page describing the trickle tube design.)

Permittee's Exhibits A, B, C, and D were accepted for the record without objection.

The Department file, which contains the originals of the Application and the Objection, correspondence between the Department and the parties, and Department processing documents, was made available at the hearing for review by the parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The record in this matter was left open for submission of additional legal arguments. The Permittee submitted a memorandum (received July 21, 1988), the Objector submitted a response

memorandum (received August 5, 1988), and the Permittee submitted a reply (received August 10, 1988). The record closed on August 12, 1988. (See July 15, 1988 Grant of Extension.)

#### PRELIMINARY MATTERS

The Permittee argues that the extension of time statute as it existed prior to 1987 legislative changes should be applied to the present determination, rather than the current statute. "The 1987 legislature imposes an additional duty, in that it requires notification, opening of an objection period, and a hearing, if it is requested by an objector, a procedure that demands a showing of diligence by the applicant as shown by the preponderance of the evidence, clearly an additional burden beyond a showing of good cause . . . ." (Applicant's July 21, 1988 Memorandum, page 9.) The Permittee cites Castles v. Dept. of Highways, 187 Mont. 356 (1980) for the proposition that a statute modifying procedures that impairs a right or imposes additional duties constitutes unlawful retroactive legislation.

However, Castles clearly indicates that when a statute merely adds procedural steps to a process, the legislation is not considered an impairment of a vested right which would make the statute retroactive. That is the case in the present matter. The 1987 legislation requiring notification, opening of an objection period, and a hearing if it is requested, adds procedural steps which must be taken before the holder of a beneficial water use permit may obtain an extension of time for commencement of the appropriation works, completion of

construction, and actual application of the water to the proposed beneficial use. However, the showing to be made by the permittee remains the same whether the pre-1987 or the post-1987 statutory language is applied; that is, the Permittee must show diligence in the completion and perfection of the permitted project.

The Permittee's argument, that a showing of diligence is "an additional burden beyond a showing of good cause", is not persuasive. A review of decisions in applications for extensions of time shows that the Department has uniformly interpreted the showing that the permittee must make to be diligence. Prior to 1987, the permittee's burden to show "good cause" was interpreted as a requirement that the permittee show he has diligently pursued completion of the appropriation works and application of the water to beneficial use. See, generally, In the Matter of the Application for Extension of Time to Perfect Beneficial Water Use Permit No. 39787-76M Transferred to Marvin and Mary Anne Rehbein, June 16, 1988 Proposal for Decision, pp. 5-9.

Therefore, the 1987 modification of MCA §85-2-312 does not alter or heighten the permittee's burden of proof, but simply adds additional procedural steps to the processing of an application for extension of time.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

## FINDINGS OF FACT

1. MCA §85-2-312(3) (1987) states in relevant part:

The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party.

2. On November 10, 1981, Provisional Permit to Appropriate Water Right No. 2482-s41S was granted to Wayne Hannah with a priority date of June 3, 1974. The Permit authorized the Permittee to divert 17.00 cubic-feet per second ("cfs") up to a total of 182 acre-feet of water per year: 17 cfs up to 172.00 acre-feet for new flood irrigation of 122 acres in the NE¼ of Section 20, 25 acres in the SE¼ of Section 20, and 25 acres in the SE¼ of Section 17, and up to 10 acre-feet for stockwatering in the NW¼SE¼SE¼ of Section 20, all in Township 13 North, Range 16 East, Fergus County, Montana.



Under the terms of Permit No. 2482-s41S, the Permittee was required to complete the permitted diversion and distribution works, and apply water to beneficial use as specified in the Permit, on or before May 1, 1984. The Permittee further was required to file the Notice of Completion of Water Development for his project on or before July 1, 1984.

3. On August 30, 1984, the Department of Natural Resources and Conservation (hereafter, the "Department") received an Application for Extension of Time for Permit No. 2482-s41S, requesting that the date of completion for his project be extended until December 1, 1987.

The reasons specified by the Permittee for requesting an extension of time were insufficient funds and an insufficient amount of time for completion.

On November 13, 1984, the Department issued a Notice of Action on Application for Extension of Time, granting an extension of time until October 1, 1987 for completion and perfection of the Permit. The Permittee was required to file the Notice of Completion for the project on or before December 1, 1987.

4. The Permittee testified that he had the financial capability to construct his proposed project when he applied for the Permit in 1974. However, the Permit was not issued until 1981 (see Department records), by which time he was unable to proceed immediately. Between 1981 and 1987 the Permittee experienced unforeseeable financial difficulties, including a divorce settlement requiring annual alimony payments, and forced



sale of his livestock and property to meet loan payments. (The place of use for his proposed irrigation is leased from a company holding the property in trust.) He attempted to get financing for the project from the SCS and from the Department of Natural Resources and Conservation's Conservation Districts Division, but was not successful.<sup>1</sup> Due to his financial situation, he was unable to obtain a bank loan. (Testimony of Permittee.)

5. In addition to his attempts to fund the proposed project, in the last several years the Permittee has checked on the cost of the necessary construction material on a bi-monthly basis, and has regularly attempted over the last three and-a-half years to get the SCS to come out to the proposed diversion site and stake off the reservoir. The Permittee testified that he was unable to get someone from the SCS out to the site until this spring (1988). On the basis of construction and cost estimates made at that time, the Permittee decided that he will stake the site out himself based on the original plans developed with the SCS in 1977 (Permittee's Exhibit 1.)

The Permittee also has talked to the trustees of the proposed place of use, which he leases, to ensure that he still has approval to proceed with the project and that he will be reimbursed for the project if the property is sold.

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<sup>1</sup>The Permittee testified that SCS funding (cost share funds) became available in the spring of 1988. However, these funds are only available if the project is built to SCS specifications. Since building the proposed project to SCS standards would approximately double the estimated cost, the Permittee decided to forego the funding.

6. On November 27, 1987, the Department received a second Application for Extension of Time from the Permittee, requesting that the date of completion for the project authorized by the Permit be extended until December 1, 1990.

7. On November 30, 1987, the Department issued a Notice of Action on Application for Extension of Time, temporarily extending the time limit specified for Permit No. 2482-s41S for an additional 120 days, "or until the Department has completed its action on the request under Section 85-2-312, MCA, whichever is greater", in accordance with MCA §85-2-312(3) 1987).

8. The pertinent portions of the Application for Extension of Time were published in the Lewistown News-Argus, a newspaper of general circulation in the area of the source, on December 30, 1987. Additionally, the Department served notice by first-class mail on public agencies and individuals which the Department determined might be interested in or affected by the request for extension of time. (See Department file.)

9. The Department received a timely objection to the Permittee's Application for Extension of Time from O'Brien, Inc. Therefore, pursuant to the provisions of MCA §85-2-312 (1987), the Department held a hearing on the Application on June 27, 1988.

10. At the hearing in this matter, the Permittee testified that his financial situation recently has improved to such an extent that he will be able to proceed with his project if an extension of time is granted in this matter. (Testimony of Permittee, Judith Hannah.)

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The Permittee testified that he would be able to purchase the headgate and culverts which must be installed before the other work is done. Once these structures are in place, he would proceed with the earthwork, using his own earthmoving equipment and doing as much of the work himself as possible. He stated that he has done similar work before from plans like the ones developed by the SCS on his project. (Permittee's Exhibit 1.)

11. Objector Rick O'Brien testified that he believes any use of water by the Permittee will affect his own water use by shortstopping water in the drainage that otherwise might reach Ross Creek and be available for use. Mr. O'Brien also expressed concerns about dam safety with regard to the Permittee's proposed dam. He testified that he had not objected to the Permittee's Application when it was readvertised in 1980, since at that point he had not had trouble getting the amount of water he needed.

Mr. O'Brien stated that he does not believe that the Permittee has taken adequate steps to diligently pursue completion of his project, and that the Permittee should not be allowed to retain his 1974 priority date.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

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2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner. (See Findings of Fact 5, 6, and 7.)

3. The holder of a Beneficial Water Use Permit is required to show good cause why the time limit for completion of the project stated on the Permit should be extended. See MCA §85-2-312(3) (1987). A showing of good cause why the time limit should be extended requires evidence that the Permittee has exercised due diligence in proceeding toward completion of the appropriation works and putting the water to beneficial use as specified in the Permit. See, generally, In the Matter of the Application for Extension of Time to Perfect Beneficial Water Use Permit No. 39787-76M Transferred to Marvin and Mary Anne Rehbein, June 16, 1988 Proposal for Decision, pp. 5-9.

4. Apart from a general allegation that the Permittee has not acted with due diligence, the Objector's concerns in this matter involve water availability and other issues which are addressed at the stage when a permit initially is granted or denied, rather than issues dealing with the Application for Extension of Time. (See Finding of Fact 11.)

The only determination to be made in the present matter is whether or not the Permittee shall be granted an extension of time in which to complete his project and perfect the water right. The application for extension of time process is not designed to review an earlier decision to grant the Permit. See

MCA §85-2-312(3). Rather, people with potential concerns must involve themselves at the initial permit stage by objecting to an application for a permit. Beyond the point when a permit has been granted, senior appropriators may rely on the priority system, and both senior and junior (to the permittee) appropriators may invoke MCA §85-2-314 if the permittee is not following the permit conditions which the Department has determined must be placed on a permit. However, the extension of time procedure is not the proper forum for addressing issues which have been determined prior to issuance of the Permit in question.

5. The issue in this matter is whether the Permittee has been reasonably diligent in perfecting the Permit, as shown by steady good faith efforts toward completing his project.

The present situation is a very borderline case. The Permittee's efforts, for the most part, have been centered on attempting to get funding and trying to find construction materials which the Permittee felt he could afford. The Department previously has held that an extended search for a "good deal" does not in itself show reasonable diligence. See, generally, In the Matter of Beneficial Water Use Permit No. 3849-s43QJ Issued to Ferdinand Stricker (October 21, 1987 Order.) Further, permittees who continue to defer beginning work on their proposed projects on the basis of an unfavorable economic climate have been held not to have the continuing bona fide intent entitling them to retain their priority date. See,

generally, In the Matter of the Application for Extension of Time on Beneficial Water Use Permit No. 27941-s40A Granted to Zinne Bros. (May 18, 1988 Proposal for Decision).

In the present case, however, the Permittee clearly showed bona fide intent to proceed with his project once a Permit was issued. (See Department records for the many actions taken by the Permittee in order to ensure that a Permit could be issued in this matter.) Subsequent to issuance of the Permit, however, the Permittee encountered financial difficulties of a kind which could not reasonably have been foreseen at the time of his Application for a Permit, see Finding of Fact 4, and which temporarily were beyond his control.<sup>2</sup> The record indicates that the Permittee took immediate and continued action to try to locate funding for the project, but was unable to raise financing prior to his extended completion deadline of December 1, 1987.

While no physical construction has taken place, the Permittee's continued bona fide intent to proceed with the project has been demonstrated by his steady efforts to finance the project and to effect the preliminary physical and legal steps which would make the project feasible at such time as he could proceed (e.g., consulting with the SCS and with the trustees of the place of use). These actions tend to show reasonable diligence.

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<sup>2</sup>This factual situation differs from situations wherein the Permittee makes a choice not to proceed because he does not want to (as opposed to being unable to) spend the necessary monies, or because he is dependent upon a factor which is permanently beyond his control (such as the agricultural economic climate).



The Permittee's good faith actions arguably would not be a sufficient basis for grant of an extension of time, however, if the facts of the situation indicated that the Permittee's financial situation was such that completion of the proposed project would be indefinitely postponed. To allow an appropriator to retain a priority date for an undeveloped project which might or might not be developed in the future penalizes junior water users and potential water users who would be able to develop the water for immediate beneficial use. The converse of allowing a permittee to retain a priority date if due diligence is applied, is that a priority date should not be allowed to remain in place if it does not appear that the underlying project can ever be completed and perfected.

In the present matter, however, the Permittee has provided credible proof that the financial difficulties which have prevented him from making physical progress on his project have been overcome, and that he can proceed to complete the project and perfect his water use within the very near future. Therefore, although this is a close call, based on the stated considerations the Hearing Examiner determines that the Permittee has sufficiently shown good cause that an extension of time may be granted in this matter.

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:



### PROPOSED ORDER

Extension of Time to Perfect Beneficial Water Use Permit No. 2482-s41S is granted to Wayne Hannah. The Permittee shall complete the appropriation works and put water to beneficial use as specified in the Permit, and file his Notice of Completion of Water Development, on or before November 30, 1991.

### NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the Proposed Order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party.

MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 4<sup>th</sup> day of October, 1988.

Peggy A. Elting  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was duly served upon all parties of record at their address or addresses this 4<sup>th</sup> day of October, 1988, as follows:

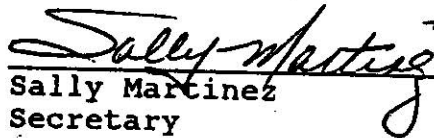
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Sally Martinez  
Secretary

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5845 # 3040